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No. 93-880

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

JUDY MADSEN, *et al.*,
Petitioners,
v.
WOMEN'S HEALTH CENTER, INC., *et al.*,
Respondents.

On Writ of Certiorari to the Supreme Court of Florida

BRIEF OF PEOPLE FOR THE AMERICAN WAY, THE ANTI-DEFAMATION LEAGUE, THE AMERICAN JEWISH CONGRESS, AMERICANS FOR RELIGIOUS LIBERTY, THE RELIGIOUS COALITION FOR REPRODUCTIVE CHOICE, AND THE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether, in the context of a pattern of illegal conduct and violations of previous injunctions, a court may constitutionally impose specific time, place and manner restrictions on individuals and organizations and those acting in concert with them to prohibit blocking access to a medical facility, harassing the facility's patients and staff, engaging in activities that threaten patients' health, and harassing and picketing staff members at their homes.

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INTEREST OF *AMICI CURIAE*

The undersigned *amici* are civil rights, civil liberties, and religious organizations whose members are deeply concerned about both sets of rights and interests at stake in this case: the First Amendment right of free expression and the right to reproductive choice protected by the due process clauses of the Fifth and Fourteenth Amendments. *Amici* believe that, when properly interpreted, the trial court's amended injunction imposes reasonable and

content-neutral time, place and manner restrictions against specific parties who intentionally and repeatedly violated the court's previous, more narrow injunctions against illegal behavior. As *amici* explain below, as a result of these factors, as well as because the amended injunction applies only to specific parties and those acting in concert with them and not to all who oppose abortion, and because of its adaptability to particular circumstances, the injunction ensures access to reproductive medical care consistent with the protection of First Amendment freedoms, and should be upheld.

People For the American Way ("People For") is a nonpartisan, education-oriented citizens' organization established to promote and protect civil and constitutional rights, including First Amendment freedoms, the constitutional right to privacy, and women's rights to reproductive choice. Founded in 1980 by a group of religious, civic and educational leaders devoted to our nation's heritage of tolerance, pluralism and liberty, People For now has over 300,000 members nationwide. People For has frequently represented parties and filed *amicus curiae* briefs before this Court in litigation seeking to defend First Amendment rights. People For also has participated in litigation protecting women's rights to reproductive choice. People For is filing this *amicus* brief because this case implicates the organization's dual concerns of ensuring women safe access to reproductive medical care, including abortion, and fully protecting First Amendment freedoms. Based on the specific record in this case, the trial court's amended injunction accomplishes both of these purposes by narrowly enjoining conduct of parties who have repeatedly harassed and violated the rights of patients and health professionals, while leaving those parties ample avenues for free expression.

The Anti-Defamation League ("ADL") is a human relations organization established over 80 years ago "to secure justice and fair treatment to all citizens alike." ADL is committed to safeguarding principles of religious

and individual liberty, including freedom of speech and association, the right to privacy, and reproductive freedom. The right to abortion, and the right to oppose abortion, raise sharp conflicting and competing interests, which must be accommodated. ADL believes the injunction at issue, which establishes content-neutral parameters for abortion protests, accomplishes that accommodation. The injunction respects the rights of individuals to voice their opinions, and, at the same time, protects the ability of other individuals to exercise their constitutional rights. In support of these principles, ADL has filed briefs in this Court in such cases as *Wisconsin v. Mitchell*, 113 S. Ct. 2194 (1993); *Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753 (1993); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S. Ct. 2791 (1992); *Hodgson v. State of Minnesota*, 497 U.S. 417 (1990); and *Frazee v. Illinois Dep't of Employment Sec.*, 489 U.S. 829 (1989).

The American Jewish Congress ("AJC") is a national organization of American Jews founded in 1918 and committed to the preservation of the civil liberties and civil rights of Jews and of all Americans. AJC has filed many briefs in this Court supporting First Amendment rights and free expression. In addition, AJC believes that a woman's freedom to choose whether, when, or if to bear children, and to obtain medical and counselling services in connection with that freedom, must and should be protected as an essential constitutional liberty.

Americans for Religious Liberty ("ARL") is a nationwide nonprofit educational organization dedicated to defending religious freedom and freedom of conscience. ARL has appeared before the Supreme Court in a number of *amicus curiae* briefs in defense of the right of all women to freedom of choice in dealing with problem pregnancies.

The Religious Coalition for Reproductive Choice is comprised of 36 national religious organizations that have

official pro-choice policies. The Coalition's purpose is to ensure that every woman is free to make decisions about when to have children according to her own conscience, without government interference. The Coalition's primary role is educating the public to make clear that abortion can be a moral, ethical, and religiously responsible decision.

The NAACP Legal Defense & Educational Fund, Inc. ("LDF") is a non-profit corporation formed to assist African Americans in securing their constitutional and civil rights and liberties. For many years LDF has pursued litigation to secure the basic civil and economic rights of low-income African American families and individuals. Litigation to ensure the non-discriminatory delivery as well as the adequacy of health care and hospital services available to African American communities has also been a long-standing LDF concern. *See, e.g., Bryan v. Koch*, 627 F.2d 612 (2d Cir. 1980) (challenging the closing of Sydenham public hospital in Harlem under Title VI of the Civil Rights Act of 1964). LDF has also worked on behalf of African Americans struggling with the burden of poor health and discriminatory and inadequate health care services.

LDF is particularly concerned with the growing rates of poverty among African Americans and with the number of single female-headed African American families that are living in poverty. Health care for low-income uninsured women and their families is a matter of great concern to LDF. Through its Poverty & Justice Program, LDF is challenging the barriers to economic advancement to help to improve the economic status and living conditions of the many in poverty.[1]

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[1] The parties' letter of consent to the filing of this brief has been filed with the Court pursuant to Rule 37.3.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case arises in the context of a sustained campaign to interfere with the operation of a family planning clinic where abortions are performed and to intimidate and harass the clinic's staff and patients. The initial judicial response was a brief order that simply prohibited certain organizations and individuals from blocking access to the clinic and physically abusing persons who worked at or used the clinic. J.A. 9. When this order failed to provide adequate protection to the clinic, its staff and its patients, and when the evidence established a concerted pattern of violation of the court's orders and continued harassment and disruption, the court entered a more detailed injunction that imposed specific time, place and manner restrictions on the defendants and those acting in concert with them. The Supreme Court of Florida, finding that the "demonstrators' tactics have impaired the functioning . . . of . . . a licensed medical facility and have placed in jeopardy the health, safety and rights of Florida women," upheld the amended injunction. *Operation Rescue v. Women's Health Ctr.*, 626 So. 2d 664, 675 (Fla. 1993).

Petitioners, who are anti-abortion activists, challenged the amended injunction on First Amendment grounds. They invoke concerns—prior restraint, content-based restrictions, overbreadth—that are central to First Amendment jurisprudence. But these concerns are not controlling on the facts of this case.

In this case, the court entered its injunction only after holding a full evidentiary hearing that revealed a history and pattern of illegal conduct and violations of previous injunctions. In this case, the court imposed time, place and manner restrictions that are content neutral and are narrowly tailored to protect significant governmental interests without materially affecting petitioners' ability to express and promote their views. And in this case, the court's doors remain open to clarify any provisions in the

injunction that may unintentionally impinge on First Amendment rights.

ARGUMENT

I. THE INJUNCTION IS CONTENT NEUTRAL.

Petitioners contend that the injunction issued by the Florida court is content based, that it imposes restrictions on demonstrators because of their anti-abortion beliefs and seeks to stifle the expression of anti-abortion views. In light of the facts of this case, however, this contention is without merit.

A. The Injunction Is Not Content Based Simply Because It Is Directed At Speakers Whose Views Are Known.

An injunction, unlike an ordinance, must be directed at specific persons.[2] Thus, an injunction enforcing even the most traditional and non-controversial time, place and manner restrictions will usually be directed against someone whose political or social views are well known. This does not mean, however, that the injunction is content based.

Take the example of a protest group that believes the United States is reducing military expenditures too quickly and therefore launches a campaign to "wake up America" by broadcasting its message by sound truck in residential neighborhoods at 1:00 in the morning. A court that was requested to enjoin the 1:00 a.m. sound truck campaign would certainly know the views of the speaker and the content of the challenged speech. But this does not mean that an injunction against the protest

[2] "'[A] court of equity is as much so limited as a court of law; it cannot lawfully enjoin the world at large, no matter how broadly it words its decree.'" *Alger v. Peters*, 88 So. 2d 903, 907 (Fla. 1956) (quoting *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832 (2d Cir. 1930) (Hand, J.)).

group barring any sound trucks between 10:00 p.m. and 8:00 a.m. is content based. As long as there is no reason to believe that an injunction would not be issued against other speakers in similar circumstances, the injunction should be regarded as content neutral. "Government regulation of expressive activity is content neutral so long as it is '*justified* without reference to the content of the regulated speech.'" *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

This same reasoning must be applied to the Florida courts and the numerous other courts throughout the nation now struggling with the issues raised by demonstrations at abortion clinics. Obviously, these courts know the views of the demonstrators, just as in years past they would have known the views of the demonstrators at draft boards, university admissions buildings or segregated lunch counters. The fact that the courts know the views of each of these speakers is immaterial, so long as that knowledge does not form the basis for the injunction and the injunction is otherwise consistent with the First Amendment. The content neutrality of an injunction depends on the nature of the restrictions it imposes, not on the views of the persons being enjoined.[3]

B. The Restrictions Imposed By The Injunction Are Content Neutral.

The injunction in this case is clearly content neutral on its face; its time, place and manner restrictions do not refer to any particular content or message. It is also

[3] The majority in *Cheffer v. McGregor*, 6 F.3d 705 (11th Cir. 1993) argued that a restriction on the speech of "the Republican Party, the state Republican Party, George Bush, Bob Dole, Jack Kemp and all persons acting in concert or participation with them. . . ." could not be content neutral. That argument is clearly incorrect. If those organizations and individuals engaged in the use of sound trucks at 1:00 a.m., a decision to restrict such conduct would certainly appear to be content neutral, absent evidence of discriminatory enforcement.

content neutral in objective. As the Court stated in *Ward*, 491 U.S. at 791, "[t]he government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral . . . ." The purposes served by the injunction here are obvious. First, the injunction seeks to assure access to the clinic to employees, patients and other invitees. Second, it seeks to protect patients and staff from being physically abused, harassed and intimidated as they enter the clinic. Third, the injunction seeks to protect the health of clinic patients by reducing noise during periods of medical treatment. Fourth, the injunction seeks to prohibit defendants from extending their harassment of clinic employees by invading the privacy of employees' homes. None of these objectives is related to the content of the regulated expression.[4]

C. The Injunction's Application To Persons Acting In Concert With Named Defendants Does Not Render It Content Based.

Petitioners argue that the injunction in this case was applied to persons accused of "acting in concert" with the named defendants in a manner that makes the injunction

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[4] Only one restriction in the injunction can arguably be considered content based: the bar against "images observable" to patients during surgery and recovery hours. In the context of paragraph 4 of the injunction, the restriction appears aimed at protecting patients from visual "noise" or clutter, irrespective of the content of the images. But even if this restriction is deemed content based, the state has the requisite compelling interest in imposing it. Patients undergoing surgery or in recovery are certainly at least as in need of protection from disturbing speech or proselytizing as voters on the way to the polls. *See Burson v. Freeman*, 112 S. Ct. 1846, 1851 (1992). *See also Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 509 (1978) (Blackmun, J., concurring); *NLRB v. Baptist Hosp.*, 442 U.S. 773, 783-84 n.12 (1979) (hospitals may shield patients from upsetting speech). In another era, a court would not have been barred from shielding servicemen undergoing surgery from the chants and placards of anti-war protesters.

content based. This argument is unsupported by the record.

It is correct that the injunction applies not only to specific organizations and individuals but also to "all persons acting in concert or participation with them." The "in concert" language is taken directly from the Florida Rule of Civil Procedure 1.610(c), which provides that "every injunction shall be binding on the parties and on those parties in active concert or participation with them." The language of the Florida rule is essentially identical to that which appears in Federal Rule of Civil Procedure 65(d).

The "in concert" language appears in both the Florida and federal rules of procedure because without it any injunction would be meaningless. Named defendants could circumvent the injunction by arranging for some other person to carry out the prohibited acts. The courts of Florida have routinely employed the "in concert" language without controversy. *See, e.g., Florida Jai Alai, Inc. v. Southern Catering Servs.*, 388 So. 2d 1076 (Fla. Dist. Ct. App. 1980); *Miami v. Miami Dolphins, Ltd.*, 374 So. 2d 1156 (Fla. Dist. Ct. App. 1979); *U Shop Rite, Inc. v. Richard's Paint Mfg. Co.*, 369 So. 2d 1033 (Fla. Dist. Ct. App. 1979).

Petitioners argue that the judge who entered the injunction ruled that persons are "acting in concert" simply because they advocate anti-abortion positions while present in the proscribed buffer zones, and that this ruling renders the injunction content based. Petitioners are unfairly characterizing the judge's comments at the hearing. The judge repeatedly stated that persons who advocated anti-abortion positions could demonstrate to the prosecutor or the trial court that they were not "acting in concert." *See* J.A. 66, 68, 70, 74, 77. In essence, the judge simply made the obvious point that the police were unlikely to

consider someone advocating a pro-choice position as "in concert." [5]

Petitioners also argue that the local police applied the "in concert" language in a content-based manner by indiscriminately arresting persons who indicated through speech or images that they held anti-abortion views. *Amici* note that any failure of the police to enforce the injunction in a proper manner does not render the terms of the injunction content based. Moreover, the Supreme Court of Florida only had before it review of "a trial court order imposing an amended permanent injunction." *Operation Rescue v. Women's Health Ctr.*, 626 So. 2d at 666. It did not have before it, and did not rule upon, the activities of the police in applying the injunction. Thus, those activities are not before this Court.

To the extent any confusion remains, this Court should make clear that this injunction can not be constitutionally applied to every person with an anti-abortion viewpoint solely on the basis of that viewpoint. *Amici* note that Florida and federal courts use the same standard to determine whether non-parties are subject to the terms of an injunction. " '[T]he only occasion when a person not a party may be punished, is when he has helped to bring about, not merely what the decree has forbidden, because it may have gone too far, but what it has power to forbid, an act of a party. This means that the respondent must either abet the defendant, or must be legally identified with him.' " *Alger v. Peters*, 88 So. 2d

[5] The majority in *Cheffer v. McGregor*, 6 F.3d 705 (11th Cir. 1993), were thus clearly incorrect in concluding that the amended injunction applies to Ms. Cheffer or any other anti-abortion person not acting in concert with named defendants. As Judge Paine explained in his dissenting opinion: "When the Amended Permanent Injunction is properly viewed as an injunction, it becomes clear that the state court lacks the power to reach Cheffer." *Id.* at 715. The only relief even arguably justified in *Cheffer*, assuming that standing existed, would have been a simple declaration that the amended injunction did not apply to Ms. Cheffer.

903, 907 (Fla. 1956) (quoting *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832 (2d Cir. 1930) (Hand, J.)). *Cf. Chase Nat'l Bank v. Norwalk*, 291 U.S. 431, 437 (1934) (quoting *Alemite*). Interpreted in this manner, the "in concert" provisions of the injunction are clearly proper. There have been no contempt convictions in this case of persons claiming that they were not "acting in concert" with the named defendants. There is thus no basis for contending that the Florida courts will apply the injunction to all anti-abortion demonstrators or be unable properly to determine whether particular individuals were actually "acting in concert" with defendants for purposes of enforcing the injunction.

To the extent necessary to protect the rights of individuals not subject to the injunction, *amici* submit this Court may properly emphasize that two independent determinations must be made before the injunction can be enforced against any individual: whether that person is violating the substantive time, place and manner provisions of the injunction, and whether that person is acting in concert with named defendants.[6] *Amici* are confident that the Florida courts will properly enforce the injunction and instruct the police on the meaning of "acting in concert," consistent with any guidance the Court may provide in this case. On the record in this case there is no justification for invalidating the injunction itself.

[6] In practice, there will be many instances in which concerted activity is clear. According to testimony in the trial court, defendant Bruce Cadle acknowledged that he was a leader of a group of anti-abortion demonstrators and could often be seen directing the activities of other demonstrators. *See* J.A. 265-66, 291, 309-10.

II. THE INJUNCTION IS NARROWLY TAILORED TO SERVE A SIGNIFICANT GOVERNMENTAL INTEREST AND LEAVES SUFFICIENT ALTERNATIVE AVENUES OF COMMUNICATION ACCESSIBLE TO THE SPEAKER.

A content-neutral restriction on the time, place or manner of expression is permissible if the restriction is narrowly tailored to serve a significant governmental interest and leaves sufficient alternative avenues of communication accessible to the speaker. *See, e.g., Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983). In this case there can be no question that the restrictions imposed by the injunction serve significant governmental interests. First, the injunction protects the health of women undergoing abortions by reducing noise levels during the period of surgery and recovery and by ensuring that women who want abortions can obtain them in a timely manner. J.A. 55. *See NLRB v. Baptist Hosp.*, 442 U.S. 773, 781-84 (1979) (upholding regulations restricting speech based on need to avoid disruption of patient care and disturbance of patients); *see also Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 509 (Blackmun, J., concurring). Second, it protects the ongoing operations of the clinic and the interests of its clients and employees by assuring access to and from the clinic without harassment and intimidation. J.A. 55.[7] Third, it protects against defendants' efforts to extend their campaign of harassment of clinic employees by invading the privacy of employees' homes. J.A. 56; *see Frisby v. Schultz*, 487 U.S. 474 (1988).

It remains necessary to determine whether the injunction is narrowly tailored to serve these significant governmental interests. In making that determination, it is appropriate to review the history of this injunction. The record demonstrates that the trial court moved carefully in its efforts to craft an injunction that restricts expressive activity as little as possible. The court first tried to address respondents' concerns through an injunction that simply enjoined petitioners from harassing clients, blocking access to the clinic and physically abusing persons entering or leaving the clinic. J.A. 5-10. This injunction remained in place for six months, during which time, as the record shows, the petitioners and other demonstrators engaged in conduct that interfered with the operations of the clinic through threats, harassment, intimidation, disruption and physical obstruction. *See generally*, J.A. 50-56. Accordingly, after a full evidentiary hearing, the court concluded that its initial injunction was insufficient and entered a more specific injunction.

[7] In *Baptist Hosp.*, this Court noted that certain expression "may disrupt patient care if it interferes with the health-care activities of doctors, nurses and staff, even though not conducted in the presence of patients." 442 U.S. at 782 n.11.

During three days of testimony, the court heard evidence that, despite its previous injunction, there had been serious interference with ingress to the clinic. Judge McGregor found that the activities of petitioners and others demonstrating with them had hindered access to the clinic's parking lots (J.A. 51, 55) and blocked traffic on the public street in front of the clinic (J.A. 52, 55). The amended injunction therefore permits anti-abortion demonstrators to gather on the south side of Dixie Way, rather than the north side, to prevent the crowd from blocking access to the clinic. J.A. 57-58.

The amended injunction was also directed at conduct shown to have posed medical risks to the clinic's patients. Judge McGregor noted testimony that

> the demonstrators [ran] along side of and in front of patients' vehicles, pushing pamphlets in car windows to persons who had not indicated any interest in such literature. As a result of patients having to run such a gauntlet, the patients manifested a higher level of anxiety and hypertension causing those patients to need a higher level of sedation to undergo the surgical procedures, thereby increasing the risk associ-

> ated with such procedures.[8] . . . The doctor also testified that he observed some patients turn away from the crowd in the driveway to return at a later date. He testified that such delay in undergoing the procedures also increased the risk associated therewith.

J.A. 54.

The court concluded that the actions of the petitioners continued to impede and obstruct both staff and patients from entering the clinic and that "the noise associated with the demonstrations impermissibly interferes with the operation of the clinic and the well-being of its patients." J.A. 55. It was on the basis of these concerns for the well-being of the clinic's patients that Judge McGregor enjoined loud noises "during surgical procedures and recovery periods . . . ." J.A. 59. Finally, the court heard testimony that clinic employees and sometimes the minor children of clinic employees were accosted in their homes by petitioners. Judge McGregor found these actions at the homes of clinic staff to be impermissible conduct. J.A. 56.

The injunction must be judged in this context and in light of the failure of the previous injunction to prevent illegal conduct. Given this history, the court was entitled to impose an injunction which might be somewhat broader in scope than that which would have been appropriate *ab initio*. The initial injunction in this case only prohibited patently illegal conduct—trespassing on clinic property, blocking access to the clinic and physically abusing persons using and working at the clinic. J.A. 9. But after hearing the evidence, the court appropriately

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[8] *Amici* note that it was this testimony that resulted in paragraph 5 of the injunction prohibiting demonstrators from approaching patients within 300 feet of the clinic. *Amici* believe that this restriction, aimed at protecting patients from unwelcome intrusion, intimidation and harassment, is content neutral. But even if it is not content neutral, the testimony as to the potential harm to patients establishes a compelling interest for the restriction. *See* note 4, *supra*.

determined that the only way to protect the clinic, its staff and its patients was to prohibit conduct that might be legal under other circumstances. Thus, to prevent demonstrators from blocking access to the clinic, the court established a 36-foot buffer zone around the clinic. Similarly, it established buffer zones to protect patients seeking to enter the clinic from unwelcome intrusion and physical intimidation and to protect clinic employees from extension of the pattern of harassment into their homes.

Petitioners contend that the fact that the injunction enjoins some possibly lawful conduct renders it overbroad and not narrowly tailored. They cite a footnote in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), stating that the injunction issued by the Mississippi courts in that case "must be modified to restrain only unlawful conduct and the persons responsible for conduct of that character." *Id.* at 924 n.67. *Claiborne* is clearly distinguishable. In *Claiborne*, the NAACP and its leaders had organized a *lawful* economic boycott of certain white-owned businesses, and no evidence connected them to the "isolated acts of violence" which occurred during the boycott and caused the damages to plaintiffs. *Id.* at 923. Furthermore, there was no evidence that the NAACP and its leaders had committed or ratified any illegal acts, or that they had violated a prior injunction preventing only unlawful conduct. *Id.* at 930-31. Despite this evidentiary record, the Mississippi court entered a large damages award and an injunction which essentially sought to stifle completely the NAACP's lawful efforts to promote economic, political, and social change in the local area. Under these facts, this Court reversed the damages award and the injunction against the NAACP and its leaders.

In sharp contrast, the court's amended injunction here addresses an admittedly illegal blockade of a medical clinic by organizations and their leaders who, according to detailed evidence, committed numerous illegal and

threatening acts. In this case, which does not involve a crippling damages award, the court's original temporary and permanent injunctions did not enjoin any constitutionally protected activity. Only after receiving extensive evidence that its two prior injunctions had been violated did the court carefully tailor specific restrictions that prohibit some possibly lawful activity.

This Court has held that where illegal conduct has been demonstrated, a trial court is "empowered to fashion appropriate restraints on the [defendants'] future activities both to avoid a recurrence of the violation and to eliminate its consequences." *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 697 (1978). This is true even though the court may enjoin some otherwise lawful activity. As the Court has stated:

> While the resulting order may curtail the exercise of liberties that the [enjoined party] might otherwise enjoy, that is a necessary and, in cases such as this, unavoidable consequence of the violation. . . . In fashioning a remedy, the District Court may, of course, consider the fact that its injunction may inpinge upon rights that would otherwise be constitutionally protected, but those protections do not prevent it from remedying the . . . violation.

Id. at 697-98; *see also Milk Wagon Drivers Union, Local 753 v. Meadowmoor Dairies*, 312 U.S. 287 (1941).

The injunction also meets the "narrowly tailored" requirement because it clearly leaves sufficient alternative avenues of communication accessible to petitioners. Petitioners are free to demonstrate anywhere except within 36 feet of the clinic and 300 feet of a clinic staffer's home. Petitioners may be as noisy as they wish except during the hours of surgery and recovery. They may present their views to all persons seeking to enter the clinic except that they may not physically approach such persons within 300 feet of the clinic unless invited to do so. In short, petitioners have ample means to communicate their views concerning abortion to patients and potential

patients of the clinic, to employees of the clinic and to the public at large.[9] In essence, petitioners are restricted only in the manner in which they can present their views to people who are "captive" in their homes or "captive" by virtue of their need for medical treatment. *See Frisby v. Schultz*, 487 U.S. at 484-85 ("[A] special benefit of the privacy all citizens enjoy within their walls, which the state may legislate to protect, is an ability to avoid intrusions.").[10]

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[9] It could be argued, of course, that the 300-foot boundary line should be 250 feet or 200 feet. This Court responded to such a contention in *Burson v. Freeman*, 112 S. Ct. 1846, 1857 (1992), by stating that "[w]e do not think that the minor geographical limitations prescribed by [a statute forbidding campaign solicitations near polling places] constitute such a significant infringement. Thus, we simply do not view the question of whether the 100-foot boundary line could be somewhat tighter as a question of 'constitutional dimension.'" As explained in Section III, *infra*, moreover, any problems with a specific boundary line can be remedied while preserving the overall injunction.

[10] Petitioners also invoke the prior restraint doctrine. This Court, however, has not applied the prior restraint doctrine to cases such as this, where a remedial injunction is entered only after a full evidentiary hearing. *See National Soc'y of Professional Eng'rs*, 435 U.S. at 696-99; *Milk Wagon Drivers Union*, 312 U.S. at 293-98. *See also* discussion in *Carroll v. Presidents and Comm'rs of Princess Anne*, 393 U.S. 175, 179-84 (1968). Nor has this Court applied the prior restraint doctrine in cases involving content-neutral restrictions except in very limited circumstances. *See Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 586-87 n.9 (1983). To do so broadly would, *inter alia*, cast doubt on the constitutionality of the venerable injunction provisions of the copyright laws. *See* 17 U.S.C. § 502; *see also* Melville B. Nimmer, *Nimmer on Freedom of Speech* § 2.05[C], at 2-57 (1984). *See also Hirsh v. Atlanta*, 495 U.S. 927, 927 (1990) (Stevens, J., concurring in denial of stay) (explaining that it is "entirely proper" to distinguish between "injunctive relief imposing time, place and manner restrictions upon a class of persons who have persistently and repeatedly engaged in unlawful conduct" and an "injunction that constitutes a naked prior restraint against a proposed march by a group that did not have a similar history of illegal conduct in the jurisdiction where the march was scheduled").

III. THE INJUNCTION MAY BE EASILY AMENDED TO AVOID ANY UNANTICIPATED CONSEQUENCES RESTRICTING FIRST AMENDMENT AND OTHER RIGHTS.

Because this case involves an injunction rather than an ordinance or statute, petitioners have an easy remedy if certain applications of the injunction might violate the First Amendment in ways not anticipated by the court. Petitioners can apply to the court to amend or clarify the injunction. As in *National Soc'y of Professional Eng'rs*, petitioners "apparently fear[] that the [trial court's] injunction, if broadly read, will block legitimate paths of expression . . . . But the answer to these fears is . . . that the burden is upon the proven transgressor 'to bring any proper claims for relief to the court's attention.'" 435 U.S. at 698. *See also Milk Wagon Drivers Union*, 312 U.S. at 298 ("If an appropriate injunction were put to abnormal uses in its enforcement . . . . the doors of this Court are always open.")[11]

Petitioners contend, for example, that paragraph 6 of the injunction, which forbids them from "approaching" within 300 feet of the residence of clinic personnel, would bar a petitioner from simply living in the same apartment complex with a clinic employee or walking down such an employee's street. But there is no reason to believe that the Florida court intended to have paragraph 6 read or enforced in such a manner. *Amici* assume that the Florida court would, if requested by petitioners, amend the injunction to permit general "approaches" that

[11] Issues of vagueness, like overbreadth, take on a very different meaning in the context of an injunction. An injunction, "arising out of a particular controversy and adjusted to it, raises totally different constitutional problems from those that would be presented by an abstract statute with an overhanging and undefined threat to free utterance." *Milk Wagon Drivers Union*, 312 U.S. at 292. Thus, the standard by which an injunction is measured is whether it is specific in its terms and describes in reasonable detail the act or acts sought to be restrained. Fla. R. Civ. P. 1.610(c); Fed. R. Civ. P. 65(d).

are not specifically directed and targeted at clinic personnel for the purposes of harassing them. *See, e.g., Hill, Darlington & Grimm v. Duggar*, 177 So. 2d 734 (Fla. Dist. Ct. App. 1965) (clarifying injunction at request of defendant).

Indeed, to the extent that potential applications of the injunction appear to create specific problems, this Court may wish to make clear its understanding of the reach of the injunction and the constitutional problems that would arise if the Florida courts were to interpret the injunction too broadly or refuse to make appropriate clarifications. Of course, the Court can strike down particular provisions of the injunction if it believes they are unconstitutionally broad and not susceptible to adequate clarification. However, *amici* do not believe this action will be necessary because the record in this case establishes that the amended injunction appropriately protects against harassment and illegal behavior in a manner consistent with First Amendment freedoms.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge that the decision of the Supreme Court of Florida be affirmed.

Respectfully submitted,

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